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Supreme Court of the United States

No. 78-168

October Term, 1978

THE GOODYEAR TIRE & RUBBER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

REPLY BRIEF OF PETITIONERS

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This reply brief is being filed to address several arguments raised by respondents with respect to the Federal Reports Act and the FTC enforcement proceeding questions.[1]

Although respondents' brief ignores the fact, it should initially be noted that since the petition was filed the Court of Appeals has rendered a decision denying the Commission's motion for issuance of the mandate, stating:

> We have examined the petitions for certiorari and find that the issues they tender are substantial.

[1] These petitioners will rely upon the separate Reply being filed by American Air Filter Company, Inc. in No. 78-167 as to the other questions presented by both petitions.

I. The Federal Reports Act.

Respondents do not contend that the Federal Reports Act question presented by petitioners is unimportant or otherwise unworthy for certiorari. Rather, they simply endorse the Court of Appeals' decision.

Petitioners agree that the Federal Reports Act ". . . does not require the Comptroller General to duplicate all of the functions initially performed by the FTC" (Brief in Opp. at 19). Section 3512(d) of the statute clearly contemplates that an agency can determine its need for information "and whether to collect such information". The Act should, however, be construed to provide for an independent evaluation by the Comptroller General, using the expertise of the General Accounting Office, of whether the agency's proposed form will generate the information sought. This is merely an objective, unbiased judgment that should be unaffected by the Comptroller General's attitude concerning the wisdom of the agency's intended use of the information. If the agency desires to count apples, the Comptroller General should insist that it eliminate or change those questions that call for oranges. Unfortunately, he has exhibited uncertainty as to his authority.

It is clear that the Comptroller General and the Commission now disagree as to his statutory function. Respondents' brief acknowledges as much (n. 23 at 21). The problem, however, is not confined to the Commission, and similar questions arise almost daily with respect to the forms of over a dozen independent regulatory agencies that are directed to thousands of persons. This case squarely presents a question of continuing importance: what is the proper role of the Comptroller General under the Federal Reports Act?

II. Summary District Court Enforcement.

Respondents assert that the absence of a conflict among the circuits on whether the Commission may obtain enforcement of a special report order in a summary proceeding makes this Court's review inappropriate (Brief in Opp. at 17). But the Commission selects the forum in which its enforcement proceedings are brought[2] and has consistently brought all such proceedings in the District Court for the District of Columbia. Accordingly, although the propriety of its procedure is open to serious debate, a conflict among the circuits on this specific question will never emerge. Even without an inter-circuit conflict, however, the issue is an important one of federal procedure. Moreover, there is an existing conflict on the underlying premise of the nature of mandamus relief (Petition at 21-22).

The Rule 81(b) issue has far-ranging significance. Respondents contend that this issue arises only in the "relatively few instances" where the Commission seeks enforcement of a special report order under Section 49 alone rather than in conjunction with a proceeding under Section 50 for civil penalties (Brief in Opp. at 17). That point is misleading because the Commission, since the *Associated Merchandising* decision[3] in 1966, has followed an exclusive practice of seeking enforcement of special report orders under Section 49 alone.[4] Thus, the Rule 81(b) issue is of continuing practical importance. Furthermore, numerous other federal agencies have comparable mandamus provisions in their statutes,[5] and this issue applies equally to their enforcement efforts.

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[2] In this case for example, while pre-enforcement actions were pending in two other districts, the Commission still chose to institute summary proceedings in the District of Columbia.

[3] 256 F. Supp. 318 (S.D.N.Y. 1966).

[4] See Petition at 19 n.16.

[5] *See, e.g.*, Petition at 20 n.17.

Respondents further urge that review is inappropriate because the differences in procedure between a plenary action and the instant cases are "inconsequential" (Brief in Opp. at 17). Respondents are mistaken. Not only do the Civil Rules, and the cases applying the Rules, distinguish clearly between plenary civil actions, to which the Rules apply fully, and proceedings to enforce subpoenas, to which the Rules have only limited application, but the Commission has steadfastly maintained throughout this litigation that the availability of summary proceedings is of the utmost importance. Why else, for example, would it refuse to permit the characterization of the petitions by which it initiated the enforcement proceedings as complaints under Rule 3?[6]

Respondents contend that, in any event, review is inappropriate because the petitioners have not been prejudiced by the summary proceedings in the instant cases (Brief in Opp. at 17). The short answer is that petitioners were denied, among other things, the discovery rights which would otherwise have been available in a plenary proceeding under the Rules. But more fundamentally, the Commission's failure to commence a civil action calls into question the subject matter jurisdiction of the district court, a matter of importance entirely without regard to the presence or absence of prejudice to the parties.

Finally respondents urge that review is inappropriate because "the question presented may become academic" by the passage of legislation dealing with the issue. This contention is particularly ironic since the legislation (H. R. 3816) before the 95th Congress that may have affected the enforcement of special report orders was *defeated* on the House's consideration of a second conference report.

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[6] See 432 F. Supp. at 283 (D.D.C. 1977).

See 124 Cong. Rec. H11017-H11032 (daily ed. Sept. 28, 1978). The issue now before the Court is obviously quite alive.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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